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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 AARON DOYLE,
8 Plaintiff,
9 v.

NO. CV-09-158-RHW

10 HALEY TAYLOR (dismissed),
11 BRIAN CHASE, and LAW
12 OFFICES OF BRIAN CHASE,
PLLC,

**ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

13 Defendants.
14

15 Before the Court are Defendants' Motion for Summary Judgment (Ct. Rec.
16 35), as well as several other miscellaneous motions (Ct. Recs. 44, 50, 57, 63, 76,
17 88 & 89). A hearing on these motions was held on May 19, 2010. For the reasons
18 set forth below, the Court grants Defendants' Motion.

19 **I. BACKGROUND AND FACTS**

20 This case has an extensive backstory, but the operative facts are simple and
21 nearly undisputed. Plaintiff brought this lawsuit against Haley Taylor, Brian
22 Chase, and Brian Chase, PLLC under the Computer Fraud and Abuse Act
23 ("CFAA"), § 1030(a)(2), also alleging several state law claims. Defendant Taylor
24 was previously dismissed by stipulation of the parties (Ct. Rec. 34).

25 Plaintiff alleges that Defendant Chase obtained a USB thumb drive from
26 Plaintiff's client, Haley Taylor, in February of 2009 and it remained in his
27 possession until May of 2009. Plaintiff alleges that this thumb drive was his
28 property and that Haley Taylor stole this thumb drive from him. For the purposes

**ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT * 1**

1 of this motion, Defendant assumes as true that Ms. Taylor in fact stole the thumb
2 drive. However, Defendant declares that Ms. Taylor told him she had received the
3 thumb drive in an anonymous mailing. Plaintiff asserts that Defendant made a copy
4 of the contents of this thumb drive and put all of the documents onto his laptop
5 computer. Defendant eventually returned the original thumb drive to the Moses
6 Lake Police Department in October of 2009 in compliance with a state court order.
7 During the time that Defendant possessed this thumb drive, he emailed electronic
8 copies, printed out copies and disseminated paper copies of the documents on the
9 thumb drive to third parties.

10 One of the documents contained in the thumb drive was titled "Notice of
11 Proposed Termination" from Plaintiff's former employer, the Sierra County
12 Sheriff's Office. It was rescinded after a settlement was reached between both of
13 the parties, and the California state court sealed the file. The California state court
14 found that "[t]he records include confidential personnel records ordinarily
15 protected against disclosure by the employee's right to privacy . . . [d]isclosure of
16 the contents of the records lodged conditionally under seal would unduly
17 embarrass [Aaron Doyle]." Defendant distributed this document to various parties,
18 including filing it in at least two court proceedings in Washington state courts.

19 II. STANDARD OF REVIEW

20 Summary judgment is appropriate when "there is no genuine issue as to any
21 material fact and the movant is entitled to judgment as a matter of law." Fed. R.
22 Civ. P. 56. A material fact is one which might affect the outcome of trial under the
23 governing law. *Lindahl v. Air France*, 930 F.2d 1434, 1436 (9th Cir. 1991)
24 (citation omitted). The substantive law in the case is essential because it determines
25 which facts are relevant to resolution of a case. *Anderson v. Liberty Lobby Inc.*,
26 477 U.S. 242, 248 (1986). In response to summary judgment, the non-moving
27 party may not rely on its pleadings, thus must respond with "specific facts showing
28 a genuine issue for trial." Fed. R. Civ. P. 56. The non-moving party must present

1 facts with probative value, which "tend to support[] the complaint." *Anderson*, 477
2 U.S. at 249. The facts are to be read in the light most favorable to the non-moving
3 party. *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1035 (9th Cir. 2007). To
4 show a genuine issue exists the party must show that a reasonable jury could find
5 for his/her side. *Id.* The finding of a genuine issue of material fact does not need
6 to be conclusive in favor of the party, but must show that a dispute as to the facts
7 requires a trial to resolve the issue. *Id.* at 248-49. Therefore, summary judgement
8 is only appropriate where there is no disagreement as to material facts which would
9 require a jury to consider the facts or the facts are "so one-sided that the [one] party
10 must prevail as a matter of law." *Id.* at 251-52.

11 III. ANALYSIS

12 A. CFAA Claims

13 In pertinent part, the CFAA creates liability for: "Whoever intentionally
14 accesses a computer without authorization or exceeds authorized access, and
15 thereby obtains... information from any protected computer." 18 U.S.C. §
16 1030(a)(2)(C). The Act provides both criminal and civil remedies; any person
17 bringing a civil action must show a loss of at least \$5,000 resulting from a
18 violation of the Act. Plaintiff contends that Defendant violated various provisions
19 of the Act when he accessed Plaintiff's USB thumb drive and retrieved the sealed
20 document. Defendant's motion advances two arguments against Plaintiff's CFAA
21 claims: (1) Plaintiff has not shown a loss, as required by the statute, and (2) a
22 thumb drive does not meet the statutory definition of a "computer."

23 The Act defines "loss" as:

24 any reasonable cost to any victim, including the cost of responding to
25 an offense, conducting a damage assessment, and restoring the data,
26 program, system, or information to its condition prior to the offense,
and any revenue lost, cost incurred, or other consequential damages
incurred because of interruption of service.

27 18 U.S.C. § 1030(e)(11). To maintain a civil action, Plaintiff must show that any
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1 such loss exceeded \$5,000 in a one-year period. 18 U.S.C. § 1030(c)(4)(A)(i)(I).
2 Defendant argues that Plaintiff has failed to show that he has incurred any costs as
3 a result of Defendant's accessing the thumb drive. In response, Plaintiff retained a
4 computer forensics expert who submitted two declarations detailing the work he
5 anticipates would be required to determine what files were copied from the thumb
6 drive and stored on other computers (Decl. of Aaron Doyle, Ex. 25 & 26, Ct. Recs.
7 69-25 & 69-26). The expert estimates that the cost of such work would easily
8 exceed \$5,000. Defendant does not again address his loss argument in his reply
9 memo.

10 The Court finds that the thrust of Plaintiff's loss assessment misses the mark.
11 Plaintiff's expert focuses on the cost that would be incurred by examining other
12 parties' computers – computers onto which Defendant allegedly copied material
13 taken from Plaintiff's thumb drive – and permanently deleting any such material
14 found. However, the Act primarily redresses damages to computers and
15 information accessed in violation of the act. *See generally United States v.*
16 *Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000). Accordingly, a number of district
17 courts have strictly construed the Act's "damages" and "loss" definitions to find
18 that plaintiffs must identify impairment of or damage to the computer system that
19 was accessed without authorization. *SKF USA, Inc. v. Bjerkness*, 636 F. Supp. 2d
20 696, 721 (N.D. Ill. 2009) (collecting cases); *Civic Ctr. Motors, Ltd. v. Mason St.*
21 *Imp. Cars, Ltd.*, 387 F. Supp. 2d 378, 382 (S.D.N.Y. 2005) ("Costs not related to
22 computer impairment or computer damages are not compensable under the
23 CFAA"). Under this interpretation of the Act, Plaintiff would have to show that the
24 thumb drive itself was somehow damaged or impaired by Defendant's act of
25 accessing the drive.

26 After reviewing the applicable law, the Court finds that Plaintiff has failed to
27 show a loss compensable under the Act. *SKF USA*, cited above, is instructive.
28 There, the court recognized that transferring data from a plaintiff's computer

1 system to a competitor without authorization fell within the ambit of the Act. 636
2 F. Supp. 2d at 721 (citing *Pacific Aerospace*). Nonetheless, the court noted that
3 while such “conduct itself may be addressed by the CFAA, Plaintiff nevertheless is
4 required to show that it suffered a harm recognized by the statute.” *Id.* Similarly,
5 here Defendant’s act of accessing the thumb drive may fall within the scope of
6 conduct prohibited by the Act, but there is no basis in the record to find that the
7 thumb drive was impaired or that Plaintiff will incur any costs associated with
8 restoring any such impairment. Moreover, Plaintiff has not shown “any revenue
9 lost, cost incurred, or other consequential damages incurred because of interruption
10 of service.” Plaintiff cites no cases, and the Court finds none, recognizing as
11 sufficient the primary loss Plaintiff alleges: the cost of examining others’ computer
12 systems and deleting misappropriated files. Rather, every case the Court has
13 reviewed includes an allegation of something more: the costs associated with
14 assessing a hacked system for damage, upgrading a system’s defenses to prevent
15 future unauthorized access, or the lost revenue caused by the misappropriation of
16 trade secrets. Under Plaintiff’s theory of “loss,” a compensable loss could accrue
17 every time any person accessed another person’s computer or thumb drive without
18 authorization and copied information stored there, because a forensic expert would
19 have to be retained to examine every computer onto which such information might
20 have been copied, and delete it. That strikes the Court as outside the intended scope
21 of the Act, and it is well beyond any case Plaintiff cites or finds. *See Pacific*
22 *Aerospace & Elec., Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1194-95 (E.D. Wash.
23 2003) (describing the history and scope of the CFAA). Rather, Plaintiff appears to
24 be attempting to use the Act and federal court to reach a garden variety case of
25 conversion, a cause of action for which state law provides an adequate remedy. The
26 Court declines to so extend the scope of the Act.

27 Moreover, even if the Court accepted Plaintiff’s theory of loss, Plaintiff’s
28 assessment of loss remains entirely speculative at this stage. Plaintiff bases his

1 assessment solely on two declarations from his expert, David Stenhouse. The first
2 declaration generally describes the process of making a “forensic image” of a
3 computer and comparing the “fingerprints” of files so that unauthorized files can
4 be deleted. However, other than a mention of Mr. Stenhouse’s hourly fee, the
5 declaration is devoid of any specific details from which a factfinder could calculate
6 an amount of loss. Mr. Stenhouse’s second declaration was prepared on April 15,
7 2010, well beyond the Scheduling Order’s deadline of December 31, 2009, for
8 disclosure of supporting expert witnesses, and the discovery cutoff of March 16,
9 2010 (Ct. Rec. 31). As such, this second declaration is procedurally improper and
10 the Court declines to consider it.

11 The Court concludes that no reasonably jury could properly award damages
12 based solely on the expert’s declaration. To do so, a jury would have to speculate
13 as to how many computers were involved, how many files were involved, how
14 many hours an expert would require to assess those computers, etc. To properly
15 assess damages in a form that could be recognized by a jury, Plaintiff would have
16 needed to utilize discovery devices to access and examine the computers on which
17 the offending material is believed to be located. As discovery has long since
18 closed, the time for doing so has passed.

19 For these reasons, the Court grants Defendants’ motion for summary
20 judgment.

21 **B. Remaining Claims**

22 Plaintiff’s CFAA claims are the only basis for federal jurisdiction, and the
23 Court declines to exercise supplemental jurisdiction over the remaining state law
24 claims. In their Motion for Summary Judgment, Defendants assert a vague
25 counterclaim for attorney’s fees as a “co-conspirator” with Taylor, who apparently
26 won an Anti-SLAPP lawsuit against Plaintiff in state court. As Plaintiff points out,
27 Defendants failed to raise this counterclaim in their Answer. Although the Answer
28 did reserve the right to do so, the Court finds Defendants’ argument for fees to be

1 strained, incomprehensible, and unsupported, and the Court rejects it.

2 **C. Third Party's Motion for Sanctions**

3 Also before the Court are Plaintiff's Motion for Order to Show Cause (Ct.
4 Rec. 44), and Chuck Allen's Motions to Quash (Ct. Rec. 50) and for Sanctions (Ct.
5 Rec. 76). These motions relate to Plaintiff's effort to depose a newspaper reporter
6 and the reporter's resistance thereto. Given the Court's resolution of Plaintiff's
7 federal claims, the Court declines to rule on these motions and remands them to
8 state court for consideration.

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendants' Motion for Summary Judgment (Ct. Rec. 35) is
11 **GRANTED.**

12 2. The District Court Executive is directed to enter judgment in favor of
13 Defendants and against Plaintiff on Plaintiff's first through fourth causes of action.

14 3. This cause is remanded to the Grant County Superior Court for the
15 consideration of Plaintiff's remaining claims, Plaintiff's Motion for Order to Show
16 Cause (Ct. Rec. 44), and Chuck Allen's Motions to Quash (Ct. Rec. 50) and for
17 Sanctions (Ct. Rec. 76).

18 **IT IS SO ORDERED.** The District Court Executive is directed to enter this
19 Order, forward copies to counsel, and **close the file.**

20 **DATED** this 24th day of May, 2010.

21
22 s/Robert H. Whaley
23 ROBERT H. WHALEY
United States District Judge

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